No. _____

In The

Supreme Court of the United States

October Term 1996

STATE OF NEBRASKA,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51 pp

QUESTIONS PRESENTED FOR REVIEW

These questions arise in the context of Nebraska statutes, under which death is a potential penalty for the crime of first degree murder, which may be committed under a felony murder theory, but in which the determination of whether the convicted individual is "death eligible" is reserved exclusively to the penalty phase of that proceeding.

1. The opinion of the Eighth Circuit Court of Appeals creates a direct and admitted conflict with the opinion of the Ninth Circuit Court of Appeals in *Greenwalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) which requires resolution.

2. May a federal court require a state court, in a first degree murder case being prosecuted under a traditional felony murder theory, to ignore state substantive law and instruct its guilt phase juries on lesser homicide offenses which have never been recognized as lesser included offenses of first degree felony murder, in order to satisfy this Court's ruling in *Beck v. Alabama*?

3. May a federal court require that states reach the "death eligibility" determination in the course of the guilt phase of trial, or may the relative culpability concerns expressed by this Court in *Enmund v. Florida* be satisfied by the "death eligibility" determination being addressed during the penalty phase of trial as currently required by Nebraska statute?

4. Is the rule announced by the circuit court a "new rule" under *Teague v. Lane*?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in question here can be found at *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996) and at App. 1.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on December 24, 1996.

Your petitioner's (hereinafter "Warden") motion for rehearing and suggestion for rehearing en banc was denied on February 27, 1997.

CONSTITUTIONAL PROVISIONS

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Eighth Amendment.

STATEMENT OF THE CASE

The crime

The following is taken from the opinion of the Nebraska Supreme Court in the course of its mandatory direct appeal of Reeves' convictions and sentences found at *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984) (hereinafter *"Reeves I"*).

At 3:46 a.m. on March 29, 1980, Janet L. Mesner made a 911 emergency call and reported that she had been stabbed, that she thought a friend was dead from stab wounds, and that her address was 3319 South 46th Street, Lincoln, Nebraska. This address was a Religious Society of Friends meetinghouse, a place in which those of the Quaker religious faith meet. Since 1977, Janet Mesner had been a live-in caretaker of the premises. Victoria L. Lamm and her 2-year-old daughter were visitors.

Lincoln police officer Steven R. Imes responded to the call and, upon his arrival, found Janet Mesner lying on the floor in the rear of the house and attended by two or three firemen. She had seven stab wounds to her chest. When Officer Imes asked who had stabbed her, Janet replied, "Randy Reeves." The officer asked if there was anyone else still in the residence. Janet replied, "My friend, I think she's dead, and a little girl."

Officer Imes then went upstairs and found the partially clad body of Victoria Lamm lying face up in the south bedroom. There was a fatal stab wound in her chest, which penetrated the main pulmonary artery of the heart, and a stab wound in her midline, which pierced the liver.

The disordered condition of the room in which Victoria's body was found indicated that a violent struggle had taken place. The floor was covered with blood, and several articles of women's bedclothes, a piece of luggage, and papers were strewn about the room. A lamp and sewing machine were overturned, and the telephone was ripped from its wall socket. A billfold containing identification of the defendant

was found near Victoria Lamm's foot. In the middle of the blood-soaked sheets on the bed, underwear, later identified as belonging to the defendant, was found. Later examination of the underwear revealed the presence of spermatozoal secretions of the defendant's blood type. Next to the bed was one of the defendant's socks. A serrated kitchen knife with Janet Mesner's blood on it was found near the bed.

When Officer Imes was investigating the bedroom, Victoria's 2-year-old daughter walked from the north upstairs bedroom. She was unharmed.

On the main floor the police found an open window in a small room adjoining the kitchen. On the outside of the house below the open window was a garbage can turned upside down. Next to the garbage can were two shoe prints in the mud; inside the house was a shoeprint in the downstairs den – all of which had the same characteristics as the shoes the defendant was wearing at the time of his arrest.

Janet Mesner was taken to Lincoln General Hospital in Lincoln where she was attended to by Drs. Chester Paul and Denise Capek. When Dr. Paul first saw Janet, she was in shock and emergency medical procedures were being undertaken.

Officer Richard J. Lutz, who had been dispatched to the emergency room, was present when Janet arrived. Janet told the officer that she had been "raped and stabbed" by Randy Reeves, and she gave his description. Janet did not know how Randy gained entrance to the residence, but she knew he was alone. She referred to the defendant as her cousin, and

> repeatedly stated, "I don't know why Randy would do such a thing to me or to my girl friend." Despite the efforts made on her behalf, Janet died at approximately 5:55 a.m.

Reeves I, 344 N.W.2d at 438-439.

Reeves subsequently was arrested and confessed to the rape and murder of Janet Mesner. *Id.*, 344 N.W.2d at 439.

State court proceedings

Reeves was charged with two counts of first degree murder under a felony murder theory. Neb. Rev. Stat. § 28-303 (1995).[1] The "predicate felony" of each of those charges being the first degree sexual assault of Janet Mesner.

Reeves pled not guilty.

A jury convicted Reeves of both counts for first degree murder. A three-judge sentencing panel then heard the penalty phase of the trial and ultimately sentenced Reeves to death for each murder.

The Nebraska Supreme Court, although it modified the mix of aggravating and mitigating circumstances to

---

[1] "A person commits murder in the first degree if he kills another person (1) purposefully and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . "

Reeves' benefit[2] and reweighed, ultimately affirmed Reeves' convictions and sentences of death on mandatory direct appeal[3] in *Reeves I*.

Reeves next sought collateral state postconviction relief.[4] The state trial court denied postconviction relief, the Nebraska Supreme Court affirmed that denial of relief and this Court granted certiorari ordering further review in light of this Court's recent decision in *Clemons v. Mississippi*. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *cert. granted*, 498 U.S. 964 (1990) (hereinafter *"Reeves II"*).

Pursuant to this Court's order, the Nebraska Supreme Court again considered Reeves' complaints in view of *Clemons* and again affirmed denial of postconviction relief. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied*, 506 U.S. 837 (1992) (hereinafter *"Reeves III"*).

Federal habeas review

In July 1990 Reeves filed his first federal habeas corpus petition and obtained a stay of execution.

In December 1994 the United States District Court for the District of Nebraska (hereinafter "district court") first granted Reeves relief.[5]

---

[2] In the Nebraska Supreme Court's de novo review of Reeves' sentences that court gave Reeves the benefit of an additional mitigating circumstance denied him at his trial level sentencing. *Reeves I*, 344 N.W.2d at 448.

[3] Neb. Rev. Stat. § 29-2525 and § 29-2528 (1995).

[4] Neb. Rev. Stat. § 29-3001 et seq. (1995).

[5] *Reeves v. Hopkins*, 871 F.Supp. 1182 (D.Neb. 1994)

On appeal to the United States Court of Appeals for the Eighth Circuit (hereinafter "circuit court") the district court's grant of relief was reversed and the matter remanded for consideration of Reeves' remaining claims. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996).

On remand the district court again granted Reeves' relief upon yet another claim.[6] On appeal the circuit court again reversed the district court's grant of relief. However, the circuit court concluded that Reeves' *Beck v. Alabama*, 447 U.S. 625 (1980) claim, upon which the district court had denied Reeves habeas relief, merited relief and ordered Reeves either resentenced to life imprisonment or retried. App. 1.

The Warden's motion for rehearing and suggestion for rehearing en banc was denied by the circuit court. App. 21. This petition follows.

ARGUMENT

I.

THE CIRCUIT COURT ACKNOWLEDGES THAT ITS OPINION CREATES A DIRECT SPLIT OF AUTHORITY WITH THE NINTH CIRCUIT COURT OF APPEALS ON THE QUESTIONS PRESENTED.

> A petition for a writ of certiorari will be granted only for compelling reasons. The following . . . indicate the character of the reasons the Court considers: (a) a United States court of appeals

[6] *Reeves v. Hopkins*, 928 F.Supp. 941 (D.Neb. 1996).

> has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . .

Rule 10(a), *Rules of the Supreme Court of the United States*.

The Eighth Circuit's opinion specifically acknowledges that its resolution of this case is in direct and irreconcilable conflict with the opinion of the United States Court of Appeals for the Ninth Circuit issued in *Greenwalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 252 (1992). The Eighth Circuit opinion does not distinguish the facts or law of *Greenwalt* from those presented by Reeves' claim here.[7] The Eighth Circuit's disagreement could not be more straightforward: "We cannot agree with [the *Greenwalt*] interpretation of the *Beck* doctrine." App. 9.

All disagreements between the circuit courts on questions of law prevent the uniform application of federal constitutional law throughout the land. However, this disagreement arises in the context of a capital case and dramatically alters the potential outcome of two, otherwise indistinguishable cases, thus heightening the already significant public interest in resolution of such conflicts by this Court.

Reeves has been ordered resentenced to life imprisonment or retried. Yet the statutory process under which Reeves would possibly be retried on the present

[7] The district court found the Ninth Circuit's reasoning and result in *Greenwalt* to be dispositive of this claim. "Judge Piester explicitly relied upon a Ninth Circuit case that was nearly on "all fours" with this case." App. 18.

charges has in this case been held by the circuit court inadequate to produce a constitutionally acceptable sentence of death upon the present charges. App. 16. Thus, Reeves' life has in all likelihood been spared by the circuit court's grant of relief based upon a theory of federal constitutional law wholly at odds with that voiced in *Greenwalt*.

In stark contrast, Greenwalt was executed by the State of Arizona in January 1997, after the *Reeves* opinion was released and after Greenwalt had specifically called the conflict created by the decision in *Reeves* to this Court's attention. See *Greenwalt v. Stewart*, ___ U.S. ___, 117 S.Ct. 794, 136 L.Ed.2d 735 (1997) (denying Greenwalt's application for a stay of his execution).

Such a disparity of result among the circuit courts on any question of law is troublesome. In capital cases it is unacceptable.

II.

BECK AND THE DISTINCT ROLE OF A NEBRASKA JURY

This Court's decision in *Beck* formed the foundation for both the Ninth Circuit's resolution of *Greenwalt* and the Eighth Circuit's opinion and order of relief in this case. Therefore, we begin our analysis with *Beck* as well.

At the outset we must note, as did the Ninth Circuit in *Greenwalt*, that *Beck* addressed an Alabama trial and sentencing system remarkably distinct from the Arizona and Nebraska systems at issue in *Greenwalt* and here. We

believe the Nebraska and Arizona processes for determining guilt of, and the appropriate punishment for, first degree murder are so fundamentally different from the Alabama statutes at issue in *Beck* that *Beck* does not dictate the grant of relief ordered in this case.

A.

Beck is, first of all, about juries and the choices and responsibilities placed upon them by state law.

As the circuit court's opinion notes,[8] the result in *Beck* is driven by this Court's concern with the impact that Alabama's unusual statutory trial and sentencing scheme had upon the jury's guilt phase factfinding role. "[W]e are unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the *jury's* factfinding function." *Beck* at 645-646 (emp.added). Nebraska simply does not place its juries in a situation even remotely analogous to that in which the *Beck* jury found itself.

Under the statutory system at issue in *Beck*, an Alabama jury was required to render a verdict upon *two* questions: (1) Guilt; and (2) Punishment. *Beck*, at 628-629. Yet Alabama statutes gave Beck's jury no discretion as to penalty, the only discretion the jury had with respect to their factual findings were in the realm of the defendant's guilt.

---

[8] App. 5-6, quoting from *Spaziano*.

Contrary to the circuit court's assumption,[9] Alabama juries were *not* informed that the trial court had the authority to override their mandatory verdict of death.[10] Therefore, from the all important mind set of Beck's jury, they were in fact confronted with an acquit-or-vote-death situation.

Also contrary to the panel opinion's reasoning,[11] this Court in *Beck* specifically recognized that the jury's mandatory verdict of death was routinely dispositive of the defendant's fate.

> [I]t is fair to infer that the jury verdict [regarding punishment] will ordinarily be followed by the judge *even though* he must hold a separate hearing in aggravation and mitigation before he imposes sentence.

Beck at 645 (emp.added).

B.

Nebraska juries are *never* placed in a *Beck*-like situation. First, Nebraska law never burdens its juries with any role whatsoever in the determination of appropriate

---

[9] App. 15, fn 13.

[10] Under the same Alabama statute at issue in *Beck* the Court described the Alabama system as follows: "The jurors were instructed to impose the death sentence if they concluded that the defendant was guilty, and *they were not told that the trial judge could reduce the sentence to a sentence of life imprisonment.*" *Hopper v. Evans*, 456 U.S. 605, 608 (1982) (emp.added).

[11] App. 15, fn. 13.

criminal punishment.[12] Second, when a determination of guilt has been made by a Nebraska jury it is *never* dispositive of the penalty to be imposed for the offense in question.

Again contrary to the circuit court's reasoning,[13] under Nebraska law even a defendant found guilty of first degree murder is simply not "death eligible" at the conclusion of the guilt phase of the trial. Only when the State has subsequently proven beyond a reasonable doubt, at the non-jury penalty phase of the trial, the presence of (1) one or more specific statutory aggravating circumstances, and (2) that those aggravating circumstances standing alone merit a sentence of death, does the guilty individual first become "death eligible" under Nebraska law. See *Tuilawpa v. California*, 512 U.S. 967 (1994) and Neb. Rev. Stat. § 29-2522 (1995).

Thus, the all-or-nothing guilt and sentencing system at issue in *Beck*, simply is not before this Court on the facts of this case.

---

[12] See Neb. Rev. Stat. § 29-2261 (1995); Neb. Rev. Stat. § 29-2522 (1995).

[13] App. 9.

III.

THE PANEL OPINION ABANDONS THE LEGAL CONCEPT OF A "LESSER INCLUDED OFFENSE" PIVOTAL IN *BECK, HOPPER* AND SIMILAR CASES, AND REPLACES IT WITH THE RADICALLY DIFFERENT CONCEPT OF OFFENSES WHICH SIMPLY MERIT LESSER PUNISHMENT.

This Court's second concern in *Beck* was that a jury which was afforded no discretion with respect to its verdict on punishment might compromise its guilt phase factfinding if they were prevented from considering otherwise existing "lesser included offenses".

Thus, *Beck* also turns upon a legally sound understanding of the term "lesser included offense".

A. What is a "lesser included offense"?

The Nebraska and federal courts employ the same legal standard to determine what is and what is not a "lesser included offense".

1. The federal test

In *Schmuck v. U.S.*, 489 U.S. 705 (1989) this Court acknowledged the long accepted concept of "lesser included offense" so pivotal to the outcome of *Beck, Hopper v. Evans*, 456 U.S. 605 (1982) and *Spaziano v. Florida*, 486 U.S. 447 (1984), and which should have been pivotal to the appropriate outcome of this case.

The linchpin of "lesser included offense" analysis is that the elements of any "lesser included offense" must be included in the elements of the greater offense.

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. *Where the lesser offense requires an element not required for the greater offense, no instruction is to be given . . .*

Schmuck at 716 (emp.added).

2. The Nebraska test

As do the federal courts, the State of Nebraska employs an elements test to determine whether an offense is a "lesser included offense" of the crime charged,[14] and employed that test in rejecting Reeves' request for instructions upon the offenses of second degree murder and manslaughter. *Reeves I*, 344 N.W.2d at 442.

3. Nebraska substantive law

Employing the elements test favored by both Nebraska and federal courts, Nebraska law has for a

---

[14] "As set out in *State v. Lovelace*, 212 Neb. 356, 360, 322 N.W.2d 673, 675 (1982), 'To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.'

That proposition is now the settled law of this state. There are obviously other ways of considering the difficult question of lesser-included offenses, but Nebraska has adopted the statutory elements test." *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605, 608 (1984); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220, 228 (1995).

century recognized that second degree murder and manslaughter are *not* lesser included offenses of the crime of first degree murder committed under a felony murder theory. *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).

B. Nebraska law requires that juries be instructed upon lesser included offenses.

Again contrary to the circuit court's characterization,[15] Nebraska law has long recognized the availability of and required the giving of lesser included offense instructions, when requested (1) if lesser included offenses of the crime charged by the State *existed* under Nebraska law, and (2) if the record would support the giving of instructions on the lesser included crimes. *State v. Heubner*, 245 Neb. 341, 513 N.W.2d 284 (1994).

However, as noted immediately above, under Nebraska substantive law no lesser included homicide offenses *exist* under Nebraska law when first degree murder is charged under a felony murder theory.

---

[15] App. 11, fn. 11.

IV.

SPAZIANO ENLIGHTENS US AS TO WHAT THE CONSTITUTION DEMANDS WHERE LESSER INCLUDED OFFENSES OF THE CRIME CHARGED SIMPLY DO NOT EXIST UNDER STATE LAW.

In *Spaziano* this Court faced a situation very similar to that before us here and resolved it in a manner contrary to the circuit court's resolution here. In *Spaziano* this Court stated:

> Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result.

Id., 486 U.S. at 455.

It is worthy of note here that in *Beck* there *did* exist, under Alabama substantive law, a "lesser included offense" of the capital crime with which Beck was charged. However, that crime was not second degree murder or manslaughter, but non-capital felony murder.[16] The evil observed by this Court in the Alabama statutory scheme was that it denied Beck an instruction on an otherwise legitimate lesser included offense which *existed* under state law. In stark contrast to *Beck*, here there were neither legislative nor judicial efforts to deny Reeves instructions upon an otherwise existing "lesser included offense".

In *Spaziano*, lesser included offenses had existed, but were barred by the applicable state statute of limitations

---

[16] "Felony murder is thus a lesser included offense of the capital crime of robbery-intentional killing." *Beck* at 628.

at the time of trial. Under that circumstance did our federal constitution prevent Spaziano's jury from considering his guilt solely of the crime of felony murder? It did not. Did that fact prevent the ultimate imposition of a sentence of death? It did not.

The circuit court's opinion attempts to analogize a century of Nebraska Supreme Court holdings that second degree murder and manslaughter simply are not lesser included offenses of felony murder, with the affirmative legislative prohibition of instructions upon an otherwise recognized lesser included offense in *Beck*.[17] They are simply not the same.

If they were identical, then how does one distinguish the action of the Arizona legislature in establishing limitations upon the prosecution of lesser included offenses from the Alabama legislation criticized in *Beck*? This Court allowed a statute of limitations to end the "existence" of a recognized lesser included offense in *Spaziano*, but that legislation did not produce the same constitutional violation observed in *Beck*. This Court's holding in *Spaziano* provides a clear message relevant here: If no lesser included offenses exist at the time of trial, our federal constitution does not require that instructions be given upon non-existent offenses nor does it prevent the eventual imposition of a sentence of death for such an offense.

> We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set

[17] App. 11, pp. 11-12 and fn. 11.

> of facts under which a murder may be committed.

Hatch v. Oklahoma, 58 F.3d 1447, 1454 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1881 (1996). Yet that is exactly what the circuit court opinion seems to command.

In the *Beck* opinion itself this Court cited with approval *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979) in which a capital sentence was affirmed in the face of a complaint that a lesser homicide instruction should have been given. *Id.*, 477 U.S. at 636, n.12.

V.

THERE EXISTS A VAST DIFFERENCE BETWEEN A "LESSER INCLUDED OFFENSE" AND AN OFFENSE WHICH MERELY MERITS LESSER PUNISHMENT.

The circuit court opinion further errs when it abandons the concept of "lesser included offense" pivotal to the result in *Beck*, *Hopper* and *Spaziano* in its analysis and instead creates from whole cloth a constitutional requirement for instructions upon any offense meriting "lesser" punishment.[18] This shift of emphasis from the concept of lesser *included* offenses, to the concept of simply "lesser" offenses is not the subject of the cases relied upon by the circuit court opinion and its adaptation is fundamentally disruptive of this accepted concept of American law.

Under our American system of criminal justice it is the State, not the defendant, who selects the crime to be charged and the elements of that crime which the State

[18] App. 13.

assumes the burden to prove.[19] We are aware of no authority permitting a criminal defendant to place upon the State the burden of proving crimes or the elements of crimes distinct from the crime the State desires to prosecute. Yet the result of the panel opinion is to place *exactly* that power in the hands of a criminal defendant.

Admittedly second degree murder and manslaughter are offenses which under Nebraska law merit "lesser" punishment than does first degree felony murder, but so are trespassing, breaking and entering, and indecent exposure. The latter are all offenses arguably committed by Reeves, but those were not the offenses the State of Nebraska elected to prosecute against him.

Under *Schmuck* the appropriate query is: Are *all* of the elements of the lesser crime upon which the defendant desires instructions *included* among the elements of the greater crime the State has elected to prosecute? If it does, then the State's burden is not increased by the giving of the lesser included instructions. However, if merely "lesser" offenses must be instructed upon then elements which are *not* elements of the crime charged suddenly and belatedly are placed at issue before the jury. This practice would lead to the same type of illogical jury process rejected by the Court in *Spaziano*.

---

[19] "At common law the jury was permitted to find the defendant guilty of any lesser offense *necessarily included in the offense charged*. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element *of the crime charged*." *Beck* at 633 (emp.added).

Neither *Beck* nor *Hopper* nor *Spaziano* command instructions upon any or all *lesser* offenses, but only instructions upon existing lesser *included* offenses.

VI.

REEVES WAIVED HIS OPPORTUNITY TO HAVE HIS JURY INSTRUCTED UPON A "THIRD OPTION".

It is also important to note here that there did exist a "lesser included offense" to the crimes with which Reeves was charged. The offense of first degree sexual assault was clearly a lesser included offense of the crimes with which Reeves was charged, it was the predicate felony upon which the felony murder charges were based.

Yet Reeves *did not ask* for lesser included offense instructions upon that offense. Reeves' strategic choice in that regard denied Reeves the opportunity to have his jury instructed upon a lesser included offense – a "third option" – meriting punishment less severe that the range of punishment established for the first degree murder with which he was charged. See *Schad v. Arizona*, 501 U.S. 624, 647-648 (1991).

Instead, Reeves placed his hopes solely upon a tactic of attempting to persuade his trial court to instruct upon lesser, but not lesser included, homicide offenses which for over a century Nebraska law had prohibited.

VII.

THE LEGITIMATE CONCERNS OF *ENMUND* ARE SPECIFICALLY ADDRESSED BY THE PENALTY PHASE OF A NEBRASKA FIRST DEGREE MURDER TRIAL.

The circuit court opinion sees some nexus between the constitutional concerns outlined in *Beck* and the constitutional concerns recognized by the Court in *Enmund v. Florida*, 458 U.S. 782 (1982). App. 12-13. We do not dispute the legitimacy of the concerns noted in either of those cases. However, we observe them to be two distinct concerns, each specifically, separately and adequately addressed by Nebraska's sentencing process.

Enmund found that it offended the Eighth Amendment that an individual "who aids and abets a felony in the course of which a murder is committed by others but who [1] does not himself kill, [2] attempt to kill, or [3] intend that a killing take place or [4] that lethal force will be employed"[20] be sentenced to death as Enmund had been under Florida law.

Again, the distinctions between Reeves' situation under Nebraska law and the Court's concerns in *Enmund* are significant.

A.

First, Reeves was convicted under a statute which *required* that he be a killer.

---

[20] *Enmund* at 797.

Neb. Rev. Stat. § 28-303 provides: "A person commits murder in the first degree if *he kills* another person . . . (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree . . . " (emp.added). The statute under which Enmund was convicted had no such requirement.

Furthermore, under the specific facts of this case there exists absolutely no question that Reeves was the one and only individual responsible for the murders of both Janet Mesner and Victoria Lamm.

Thus, the *Enmund* concern that a relatively "innocent" actor might be sentenced to death under a felony murder theory, is not present here under either Nebraska law or the specific facts of this case.

B.

Second, at the penalty phase of a first degree murder trial the Nebraska legislature has directed specific inquiry into exactly the concerns which were absent in *Enmund* and thus prompted this Court's intervention.

Under the Florida system, neither the elements of Enmund's crime nor the penalty phase process addressed this Court's Eighth Amendment concerns.[21] Yet under Nebraska law at least two statutory mitigating circumstances prompt inquiry into the relative culpability of the defendant for the homicide in question. "The offender was an accomplice in the crime committed by another person and his participation was relatively minor." Neb.

---

[21] *Enmund* at 785.

Rev. Stat. § 29-2523(2)(e) (1995). "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." Neb. Rev. Stat. § 29-2523(2)(g) (1995).

The Florida system which sentenced Enmund to death focused exclusively upon the nature of the homicides rather than the relative culpability or level of participation of the individual found guilty of those killings.[22] Nebraska Mitigator E, which most closely addresses the Court's concerns in *Enmund*, is simply not applicable here. Reeves singlehandedly murdered these two women. Furthermore, Reeves was specifically afforded the benefit of Nebraska Mitigator G[23] in the "weighing" process, while Enmund received the benefit of absolutely no mitigation despite his relatively minor involvement in the homicides at issue in that case.

A comparison of the Nebraska system and the Florida system at issue in *Enmund* fails to produce any significant similarities from the standpoint of the Eighth Amendment concern here. Furthermore, the radically dissimilar facts of the two cases argue strongly against the result ordered here by the circuit court.

---

[22] *Enmund* at 785.

[23] See *Reeves I*.

VIII.

THE RULING OF THE CIRCUIT COURT CREATES A "NEW RULE" UNDER *TEAGUE V. LANE*.

In addition to the concerns noted above, we believe the rule announced by the circuit court, if a correct statement of the law, is a "new rule" as defined by this Court's opinion in *Teague v. Lane*, 489 U.S. 288 (1989) and therefore cannot form the basis of relief for Reeves.

Certainly the rule announced by the circuit court was not in place at the time that Reeves' sentences became final. Furthermore, the direct conflict presently existing with the Ninth Circuit on this very question indicates that the rule announced by the circuit court in this case was susceptible to debate among reasonable minds long after Reeves' convictions and sentences became final.

CONCLUSION

A distinct split of authority exists between the manner in which the Ninth Circuit and the Eighth Circuit have resolved the questions presented. That split of authority requires remedy if our federal constitution is to have uniform meaning and application throughout our country.

In the end the Eighth Circuit opinion concludes that no state may impose the death penalty under a historically accepted definition of felony murder.[24] Instead,

---

[24] App. 13.

States are commanded to amend their definitions of "felony murder" to require a showing of a specific intent to kill with respect to the homicide. This is an invasion of the States' right to define crimes and their punishment not authorized or justified by either *Beck* or *Enmund*.

The evils which the Court remedied in *Beck* and *Enmund* simply are not present in this case.

Respectfully submitted,

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

[Material Irrelevant To This Petition Deleted In Printing]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 95-1098/95-1188

Randolph K. Reeves, Appellee/Appellant v. Frank X. Hopkins, Warden of the Nebraska Penal and Correctional Complex, Appellant/Appellee.	* * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: September 9, 1996
Filed: December 24, 1996

Before BOWMAN, BRIGHT, and BEAM, Circuit Judges

BEAM, Circuit Judge.

Randolph Reeves was convicted of two counts of felony murder and sentenced to death. Following unsuccessful appeal and postconviction actions in Nebraska state court, Reeves was granted habeas corpus relief in

federal district court. We reversed, but retained jurisdiction and remanded to the district court for findings on Reeves's remaining claims. The district court again granted the petition and vacated Reeves's death sentence. For the second time, the State appeals the district court's grant of the writ.

We conclude that the district court erred in its grounds for granting the writ. We also conclude, however, that the district court erred in deciding that Reeves was not entitled to a jury instruction on lesser included offenses, a violation of *Beck v. Alabama*, 447 U.S. 625 (1980). On this basis, we conditionally grant Reeves's petition for habeas corpus.

I. BACKGROUND

The facts of this case are set out fully in the Nebraska Supreme Court's opinion in Reeves's state appeal. *State v. Reeves*, 344 N.W.2d 433, 438-40 (Neb. 1984) ("*Reeves I*"). A summary, however, is in order.

On March 29, 1980, Reeves killed Janet Mesner and Victoria Lamm in a Quaker meetinghouse in Lincoln, Nebraska. Ms. Mesner and Reeves were friends, and were in fact related. Reeves, who had been drinking heavily and had ingested some peyote buttons, entered a window of the house and either sexually assaulted or attempted to sexually assault Ms. Mesner in her bedroom. In the course of the assault, Reeves stabbed Ms. Mesner seven times with a knife he had taken from the kitchen. When Ms. Lamm entered the room during the assault, Reeves stabbed her to death. Ms. Mesner was mortally wounded, but was able to find a telephone and dial 911. Ms. Mesner

identified Reeves as her attacker before dying less than three hours later at a local hospital.

Reeves was charged with two counts of murder in the course of or while attempting a sexual assault in the first degree. *See* Neb. Rev. Stat. § 28-303. Reeves presented defenses of insanity and diminished capacity, but was convicted on both counts. Under Nebraska law, a first degree felony murder conviction carries possible sentences of life imprisonment or death. Neb. Rev. Stat. § 28-105(1). A three-judge sentencing panel sentenced Reeves to death. On appeal, the Nebraska Supreme Court held that the sentencing panel had failed to consider a mitigating factor and had improperly applied an aggravating factor in determining Reeves's sentence. *Reeves I*, 344 N.W.2d at 447-48. The court, however, reexamined the applicable factors and affirmed the death sentence. *Id.* at 448.

Reeves then pursued state postconviction remedies. The Nebraska Supreme Court again affirmed his sentence. *State v. Reeves*, 453 N.W.2d 359, 388 (Neb. 1990) ("*Reeves II*"). The United States Supreme Court, however, vacated *Reeves II* and remanded the case for reconsideration in light of its holdings in *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Reeves v. Nebraska*, 498 U.S. 964 (1990). On remand, the Nebraska Supreme Court once again affirmed Reeves's sentence. *State v. Reeves*, 476 N.W.2d 829, 841 (Neb. 1991) ("*Reeves III*").

Reeves then brought this federal habeas corpus action under 28 U.S.C. § 2254, raising forty-four claims. The district court granted relief on the ground that the Nebraska Supreme Court did not have authority under

state law to independently reweigh aggravating and mitigating factors in affirming a death sentence. *Reeves v. Hopkins*, 871 F. Supp. 1182, 1202 (D. Neb. 1994). The district court considered and rejected Reeves's claims related to jury instructions, including a claim that the trial court improperly denied his request to have the jury instructed on lesser included offenses of felony murder, in violation of *Beck v. Alabama*, 447 U.S. 625 (1980). *Reeves v. Hopkins*, 871 F. Supp. at 1205.[1] The court left unresolved seven of Reeves's claims.[2]

On appeal we reversed, holding that the district court exceeded federal court authority in determining that Nebraska law did not authorize the Nebraska Supreme Court to reweigh aggravating and mitigating factors in capital cases. *Reeves v. Hopkins*, 76 F.3d 1424, 1427 (8th Cir.), *cert. denied*, 117 S. Ct. 307 (1996). We did not reach Reeves's *Beck* claim, instead remanding and instructing the district court to make determinations on the claims it had not reached. *Id.* at 1430-31. We expressly noted that we retained jurisdiction on those issues decided by the district court that we had not reached, and would consolidate those issues with any future appeal. *Id.* at 1431.

On remand, the district court rejected all but one of Reeves's remaining claims. The court determined that the Nebraska Supreme Court had resentenced Reeves in

---

[1] The court also rejected Reeves's claim 44, challenging the introduction at trial of Janet Mesner's statements identifying Reeves as her attacker. *Reeves v. Hopkins*, 871 F. Supp. at 1210. Reeves has not cross-appealed this determination.

[2] The court did not reach claims 5, 6, 26, 27, 34, 36, and 38.

Reeves III when it again affirmed the death penalty on remand from the United States Supreme Court, but violated due process by failing to give Reeves notice of resentencing and an opportunity to be heard. *Reeves v. Hopkins*, 928 F. Supp. 941, 965-66 (D. Neb. 1996).[3]

The State appeals the district court's findings on the due process claim, and we agree that the court below erred on this issue. We also conclude, however, that Reeves's *Beck* claim is meritorious and that the district court improperly rejected this claim in its first decision in 1994.

II. DISCUSSION

In this section 2254 habeas corpus action, we review the district court's factual findings for clear error and its legal conclusions de novo. *Culkin v. Purkett*, 45 F.3d 1229, 1232 (8th Cir.), *cert. denied*, 116 S. Ct. 127 (1995).

* * *

B. The *Beck* Claim

Reeves was charged with two counts of first degree murder under a felony murder theory, for killing during the course of a first degree sexual assault or attempted

---

[3] The district court also concluded that our retention of jurisdiction in our prior decision rendered it without authority to consider Reeves's motion to submit new evidence of actual innocence. *Reeves v. Hopkins*, 928 F. Supp. at 976. Reeves appeals this conclusion. Because we grant the writ on other grounds, we need not reach this issue.

first degree sexual assault.[8] Under Nebraska law, first degree murder is punishable by either life imprisonment or by death. Neb. Rev. Stat. §§ 28-303, 28-105(1). Reeves requested, and was denied, jury instructions on second degree murder and manslaughter.[9] The jury was therefore only instructed on the crime of first degree felony murder. Reeves argues that the refusal of his proposed instructions violated *Beck v. Alabama*, 447 U.S. 625 (1980). We agree.

---

[8] Reeves was charged under Neb. Rev. Stat. § 28-303, which provides that:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary.
>
> . . .

[9] The applicable statutory provisions are as follows:

> **§ 28-304. Murder in the second degree; penalty.**
>
> (1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
>
> **§ 28-305. Manslaughter; penalty.**
>
> (1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

Second degree murder carries a maximum sentence of life imprisonment. *Id.* at §§ 28-304(2), 28-105(1). Manslaughter carries a maximum sentence of twenty years. *Id.* at §§ 28-305(2), 28-105(1).

In *Beck*, the petitioner was tried on a single count of intentionally killing during the course of a robbery. *Id.* at 627. Under Alabama law, when a jury found a defendant guilty of this charge, it was required by statute to return a sentence of death. *Id.* at 628 n.3. The trial court, however, was the final sentencer and was free to impose the death sentence or a life term. *Id.* at 629 n.4. The statute under which Beck was charged expressly prohibited trial courts from giving instructions on lesser included noncapital offenses, even if the evidence would support a conviction on a lesser included offense. *Id.* at 628 & n.3.

The Supreme Court held that in a capital case due process requires that the jury be given the option of convicting the defendant on a lesser included noncapital offense if the evidence would support conviction on that offense. *Id.* at 638. The Court in *Beck* sought to avoid presenting juries with a "death or nothing" choice between conviction of a capital crime and finding the defendant not guilty. Faced with such a choice, jurors might decide to acquit, even though they believed that the defendant had committed a crime. On the other hand, they might convict of the capital crime, even though they felt that the defendant did not deserve the death penalty. This choice, the Court explained, is unacceptable because "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished." *Id.* at 637. This risk of such a choice "cannot be tolerated in a case in which the defendant's life is at stake." *Id. See also Schad v. Arizona*, 501 U.S. 624, 646 (1991). As the Court later explained, "[t]he goal of the *Beck* rule . . . is to

eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984).

The State argues that *Beck* is inapplicable because the Nebraska Supreme Court has determined that, under state law, there are no lesser included offenses of felony murder. Both before and after Reeves's conviction, the Nebraska court repeatedly made clear its view that in felony murder cases "it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter." *State v. Montgomery*, 215 N.W.2d 881, 883 (Neb. 1974). *See also State v. Massey*, 357 N.W.2d 181, 185-86 (Neb. 1984) (quoting *Reeves I*, 344 N.W.2d at 442); *State v. Hubbard*, 319 N.W.2d 116, 118 (Neb. 1982); *State v. McDonald*, 240 N.W.2d 8, 14 (Neb. 1976). We are directly faced, therefore, with the question whether the State's prohibition is consistent with *Beck*.

The State contends that once the Nebraska Supreme Court has determined that felony murder has no lesser included offenses, then Reeves's *Beck* claim necessarily fails. The State urges us to follow *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991), in which the Ninth Circuit rejected an Arizona prisoner's *Beck* claim. The court in that case reasoned that "Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense." *Id.* at 1029 (citing *State v. Greenawalt*, 624 P.2d 828, 846 (Ariz. 1981)) (*en banc*). The court concluded on this basis that *Beck* was inapplicable.

We cannot agree with this interpretation of the *Beck* doctrine. The State's position would say in effect that *Beck* means only that a criminal defendant is entitled to instructions on lesser included offenses to which state law says he or she is entitled. But if this were true, then *Beck* itself would have been decided differently. In *Beck*, as in this case, state substantive law specifically prohibited the giving of a lesser included offense instruction. The problem was not merely a trial court's decision not to instruct the jury, nor was it Alabama's definition of lesser included offenses. The unacceptable constitutional dilemma was that state law *prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible. The prohibition in Reeves's case is based on the Nebraska Supreme Court's pronouncement of state law, rather than upon a statute. But there is no principled reason to distinguish such a prohibition imposed by the state courts from one imposed by the state legislature.[10] The constitutional violation is the same.

---

[10] Similarly, the Fifth Circuit has held that the *Beck* doctrine imposes federal constitutional limits on state law governing when a trial court may refuse to give an instruction on a lesser included offense. *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir. 1988). The court noted that "[i]f due process is violated because a jury cannot consider a lesser included offense that the 'evidence would have supported,' . . . the source of that refusal, whether by operation of state law or refusal by the state trial court judge, is immaterial." *Id.* at 767 n.2 (citation to *Beck* omitted).

We note that in rejecting a petitioner's *Beck* argument in *Blair v. Armontrout*, we stated that "*Beck* does not prescribe a first-degree murder instruction in this case unless first-degree

We believe that in arguing to the contrary, the State misreads the Supreme Court's clarifications of the *Beck* doctrine. In *Hopper v. Evans*, the Court held that under *Beck* "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." 456 U.S. 605, 611 (1982) (emphasis in the original). In *Spaziano*, the Court held that *Beck* did not apply when the statute of limitations had run on all lesser included offenses and the defendant refused to waive the statute. 468 U.S. at 456-57. The Court stated that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Id.* at 455.

---

murder is a lesser-included offense of capital murder . . . and the [State] Supreme Court [has held] that first-degree murder [is] not a lesser-included offense of capital murder." 916 F.2d 1310, 1326 (8th Cir. 1990). In *Blair*, however, we did not directly face the issue whether *Beck* could be vitiated by a state's determination that a particular crime has no lesser included offenses. There was no *Beck* violation in *Blair* because: (1) the jury had both the option and power to impose a life sentence, rather than a death sentence; and (2) the defendant *was* given jury instructions on both second degree murder and manslaughter. *Id.* Neither is true of this case.

We made a similar statement regarding a state's definitions of lesser included offenses in *Williams v. Armontrout*, 912 F.2d 924, 928 (8th Cir. 1990) (*en banc*). In that case, however, *Beck* did not apply because the evidence would not have supported a conviction for the charge for which the defendant requested an instruction. *Id.* at 929. *Williams* was thus squarely within the limitation on *Beck* clarified by *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (holding that *Beck* requires instructions on noncapital offenses only when the evidence would support a conviction on that charge).

The Ninth Circuit in *Greenawalt* cited *Spaziano* to support its conclusion that Arizona's nonrecognition of any lesser included offenses foreclosed a *Beck* claim. *Greenawalt*, 943 F.2d at 1029. We believe that this reads *Spaziano* much too broadly. In *Spaziano*, the defendant *could not have been convicted* of any lesser included offenses because the applicable statutes of limitation had all run and the defendant refused to waive them. The Court found that instructing the jury on a charge that could not have resulted in a conviction would compound the distortion of factfinding that troubled it in *Beck*:

> Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted . . . would simply introduce another type of distortion into the factfinding process.
>
> . . . *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice.

Id. at 455-56. *Spaziano* does not stand, therefore, for the proposition that state law can foreclose *Beck* claims by declaring that felony murder has no lesser included offenses; this is exactly what the Alabama legislature had done in *Beck*, after all.[11] *Spaziano* stands, rather, for the

---

[11] The State argues that "but for the specific statute struck down which prohibited such jury instructions [on lesser included offenses], there existed, under Alabama law, lesser included offenses of the crime with which Beck was charged." State's Reply Brief (1995) at 11-12. But this is merely to say that "if state law had not prohibited an instruction, it would have permitted it." This is, of course, true. But it is equally true of Nebraska law.

eminently sound notion that juries should not be mislead into "convicting" someone of a charge for which he or she cannot be convicted. There is no question of such trickery in this case. Reeves could have been convicted and sentenced for either second degree murder or manslaughter.

The State's rationale for prohibiting instructions for noncapital murder in felony murder cases further supports our conclusion. The Nebraska Supreme Court has said that felony murder differs from other murder because it requires no showing of any intent to kill: "The turpitude involved in the [underlying felony] takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for [the underlying felony]." *Reeves I*, 344 N.W.2d at 442 (citations omitted). Thus, a finding that Reeves intended the underlying felony (actual or attempted first degree sexual assault) takes the place of any showing that Reeves intended to kill. At oral argument, the State reiterated that the difference between the mental states required for felony murder and premeditated first degree murder is the basis for the prohibition on lesser included offense instructions in felony murder cases.

There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction. However, the *death penalty* cannot be imposed on a defendant without a showing of some culpability *with respect to the killing itself*. *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Before a state can impose the death penalty, there must be a showing of

both major participation in the killing and reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158 (1987). *Enmund* and *Tison* are thus independent constitutional requirements of the mental culpability a state must prove if it is to impose a *death sentence;* if the death sentence is to be imposed, the state must necessarily produce some evidence of intent with respect to the *killing*. Nebraska's rationale for prohibiting lesser included offense instructions in felony murder cases thus disappears when the defendant is sentenced to death. We are led to the conclusion that the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life. To hold otherwise would mean that the State could avoid *Beck* by claiming that it need show no intent or reckless indifference with respect to the killing, yet could simultaneously avoid *Enmund* by adducing precisely such evidence.

We do not suggest that the State may not impose the death penalty pursuant to a felony murder conviction. We mean to say only that the State's prohibition on instructions on noncapital charges in felony murder cases is inconsistent with *Beck*, and that its rationale for the prohibition would put *Beck* at odds with *Enmund*. In *Greenawalt*, the Ninth Circuit reads *Enmund* to apply only in situations of "accomplice felony murder" where the Eighth Amendment requires a specific showing of mens rea before the death penalty may be imposed. 943 F.2d at 1028. We think this unduly narrows the Supreme Court's holdings in *Enmund* as well as *Tison*, especially in cases

such as this. Reeves's insanity and diminished capacity defenses raise the same "mental state" concerns considered by the Court in both *Enmund* and *Tison;* indeed, the facts of this case and Reeves's defenses indicate the need for particular care that Reeves's "punishment . . . be tailored to his personal responsibility and moral guilt." *Enmund,* 458 U.S. at 801.

The death penalty concerns expressed in *Enmund* and *Tison* lie at the core of the *Beck* doctrine. As the Court explained in *Hopper, Beck* teaches that the Eighth and Fourteenth Amendments require that the death penalty must be "channeled so that arbitrary and capricious results are avoided." 456 U.S. at 611. We believe that Reeves's case comes within *Beck* and *Hopper.* The facts would have supported a conviction for either second degree murder or manslaughter, and unlike in *Spaziano,* Reeves could have been convicted and sentenced for those crimes. Instead, Reeves's jury was faced with a stark choice: convict Reeves of capital murder or acquit him altogether.[12] State law, whether expressed by a

[12] Furthermore, the "death or acquit" dilemma may have been exacerbated in Reeves's case. Reeves presented an insanity defense, but the trial court refused to instruct the jury that an acquittal by reason of insanity would not have resulted in Reeves's release. In addition, the prosecutor erroneously told the jury in summation that an acquittal would mean that Reeves would "walk out of this courtroom a free man." While the district court was unsure whether the prosecutor's statement referred to Reeves's insanity defense or merely to the effect of an acquittal on the merits, the Nebraska Supreme Court stated in *Reeves I* that "the statement made by the prosecutor was not an entirely correct statement of the law." 344 N.W.2d at 443. While we agree with the district court that neither the refused

statute or by a court, may not prohibit an instruction on a noncapital charge that the evidence supports when the defendant is subsequently sentenced to death.[13] We therefore hold that the trial court's refusal to grant Reeves's request for instructions on second degree murder and manslaughter violated *Beck v. Alabama.*

* * *

D. Relief

Having found Reeves's *Beck* claim meritorious, we must still determine what relief is appropriate. We have previously held that *Beck* only applies in cases where the defendant is in fact sentenced to death. *Pitts v. Lockhart,* 911 F.2d 109, 112 (8th Cir. 1990). The *Beck* violation in this case thus can be cured in one of two ways: (1) by granting Reeves a new trial; or (2) by resentencing Reeves to life imprisonment, which is a statutorily authorized sentence for felony murder.[15] We therefore find it appropriate to grant a conditional writ of habeas corpus: Reeves's conviction will be vacated subject to a new trial unless,

insanity instruction nor the prosecutor's misstatement is sufficient in itself to violate due process, *infra* at 18-19, the effect could only have heightened the "death or acquit" dilemma.

[13] The State argues that *Beck* involved a statute that automatically imposed the death sentence, whereas Reeves's jury had no involvement in sentencing. But the Alabama statute in *Beck* was not a "mandatory death" statute; the judge had final sentencing authority, and was free to reject the death penalty. Furthermore, Reeves correctly argues that when *Beck* was decided, the Supreme Court had already declared "mandatory death" statutes

[14] *See* Neb. Rev. Stat. §§ 28-303, 28-105(1).

within 180 days from the issuance of the mandate, his death sentence is modified to life imprisonment.

III. CONCLUSION

We find that the trial court's refusal to instruct the jury on noncapital murder charges violated *Beck v. Alabama*, and that the district court thus erred in dismissing Reeves's claim 20(b). We conditionally grant Reeves's petition for the writ of habeas corpus: his conviction will be vacated subject to a new trial unless the State resentences Reeves to life imprisonment within 180 days. Because we conclude that Reeves's due process argument is groundless, we reverse the district court's finding on claim 34. We affirm the district court's findings dismissing all of Reeves's other claims.

BRIGHT, Circuit Judge, concurring separately.

Judge Beam's well written opinion persuasively and logically explains that the application of *Beck v. Alabama*, 447 U.S. 625 (1980), requires that we remand this case for appropriate relief under a conditional writ of habeas corpus. I agree.

Having directed the issuance of a writ of habeas corpus, which will require the State of Nebraska either to retry Reeves or sentence him to life imprisonment, I would not reach the due process claim discussed in part II A of the court's opinion. In all other respects, I concur.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[Material Irrelevant To This Petition Deleted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RANDOLPH K. REEVES, Petitioner, vs. FRANK X. HOPKINS, Respondent.	)	CV90-L-311 **MEMORANDUM AND ORDER** (Filed Dec. 16, 1994)

This is a habeas corpus case, brought pursuant to 28 U.S.C. § 2254, challenging Petitioner's conviction for two murders and the death sentences which resulted. Pending before me is the thoughtful and comprehensive report, recommendation, and order (Filing 111) of the Honorable David L. Piester, United States Magistrate Judge, regarding Petitioner's amended petition for habeas corpus.

In his report and recommendation, Judge Piester addressed forty-four claims[1] asserted in Petitioner's amended petition and found that:

> 1. Petitioner abandoned certain claims (claims 3, 7, 15, 16, 33, 35, 37, 41, 43 and part of 44 (that portion not related to ineffective assistance of trial counsel)). (Filing 111, at 10-15.)
>
> 2. Certain of Petitioner's claims were procedurally defaulted (claim 20(c) (that part claiming that all types of

* * *

---

[1] For ease of reference, the numbered claims described on pages 6-9 of Judge Piester's report and recommendation are attached to this opinion as appendix A.

B.

Petitioner next complains about Judge Piester's resolution of claim 20(b). (Filing 111, at 40-41.) Petitioner argues that the state district court erred in not giving a lesser-included-offense instruction, thereby violating the rule announced in such cases as *Hopper v. Evans*, 456 U.S. 605, 611 (1982), and *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). Judge Piester concluded that since the state supreme court had held in *Reeves I* that under Nebraska law second-degree murder and manslaughter are not lesser-included offenses of felony murder, federal law did not require a lesser-included-offense instruction.

Judge Piester explicitly relied upon a Ninth Circuit case that was nearly on "all fours" with this case. In *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 252 (1992), the United States Court of Appeals for the Ninth Circuit held that where, as in Arizona, there is no lesser-included offense under state law for felony murder, *Beck* and similar cases do not require, and may not even permit, the giving of such an instruction.

In arriving at this conclusion, Judge Piester recognized that he was precluded from reviewing the decision of the Nebraska Supreme Court that felony murder has no lesser-included offense. He cited *Blair v. Armontrout*, 916 F.2d 1310, 1326-30 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 89-90 (1991) (rejecting the argument that the Missouri Supreme Court's rulings on first-degree murder as a lesser-included offense of capital murder were inconsistent), for the proposition that the federal courts may not review a state court's decision of state substantive law if

the decision rests on an adequate foundation. Indeed, as that case points out, the United States Supreme Court has ruled that "a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

Petitioner now argues that the Nebraska Supreme Court's opinion in *Reeves I* was not based upon an adequate foundation and that Judge Piester should have reviewed the court's conclusion that under Nebraska law there are no lesser-included offenses for felony murder. I disagree with Petitioner.

Simply stated, the opinion of the *Reeves I* court rests upon an adequate foundation of substantive state law. *Reeves I*, 216 Neb. at 217; 344 N.W.2d at 442 (citing and quoting *State v. Hubbard*, 211 Neb. 531; 319 N.W.2d 116 (1982)). In *State v. Hubbard*, decided before *Reeves I*, the Nebraska Supreme Court carefully considered and decided that felony murder has no lesser-included offenses and that it is error to give such an instruction, even if requested. *Hubbard*, 211 Neb. at 533-34; 319 N.W.2d at 118.

Essentially, the Nebraska Supreme Court ruled that in terms of intent there is a fundamental difference between first-degree murder, second-degree murder or manslaughter viewed as one class of murder, and felony murder viewed as another class of murder, and therefore, it would be improper to give a lesser-included-offense instruction that mixed the different concepts of intent. In reaching this conclusion, the Nebraska Supreme Court cited and analyzed various prior opinions of the Court.

Hubbard, 211 Neb. at 533-34; 319 N.W.2d at 118 (discussing *State v. McDonald*, 195 Neb. 625, 636-37, 240 N.W.2d 8, 15 (1976), and *State v. Bradley*, 210 Neb. 882, 885, 317 N.W.2d 99, 101-02 (1982)).

On one hand, the court observed that in a first-degree murder case, second-degree murder and manslaughter are subsumed as possible lesser-included offenses because all three offenses concentrate on the *intent required as to the killings*. On the other hand, in a felony murder case, second-degree murder and manslaughter are not subsumed as possible lesser-included offenses because felony murder concentrates on the *intent required to commit the underlying felony and not the intent required as to the killings*.

Accordingly, the Nebraska Supreme Court believed that it would improperly mix intent concepts to instruct that second-degree murder and manslaughter are lesser-included offenses of felony murder because felony murder focuses on one type of intent, i.e., intent to commit the act which constitutes the felony during which the killing occurred, while second-degree murder and manslaughter (as well as first-degree murder) focus on a fundamentally different type of intent, i.e., intent to kill.

While one can argue with this analysis, as the Ninth Circuit's opinion in *Greenawalt v. Ricketts* points out, other state courts have reached similar conclusions. Since the opinion of the Nebraska Supreme Court is founded upon a rational and thoughtful analysis of its own substantive law, there is no basis for a federal court to disregard the court's reasoned opinion as to its own law.

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 95-1098NEL
No. 95-1188NEL

Randolph K. Reeves,	*	
Appellee/Appellant,	*	Order Denying
	*	Petition for Rehearing
vs.	*	and Suggestion for
	*	Rehearing En Banc
Frank X. Hopkins,	*	
	*	
Appellant/Appellee.	*	

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Wollman, and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

February 27, 1997

Order Entered, at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit
